(4)

No. 95-836

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL J. POSNER, BY HIS PARENT,
LOUIS J. POSNER, PETITIONER

v.

CENTRAL SYNAGOGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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9 pp

QUESTION PRESENTED

Title III of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (Supp. V 1993), prohibits discrimination on the basis of disability in public accommodations, but exempts religious organizations from that prohibition. 42 U.S.C. 12187 (Supp. V 1993). The question presented is whether the exemption for religious organizations violates the Establishment Clause of the First Amendment.[1]

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[1] The United States intervened in this action for the sole purpose of defending the constitutionality of the exemption, and our participation in the lower courts was limited to addressing that issue. We therefore do not address the other questions raised by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a10) is unpublished, but the decision is noted at 57 F.3d 1064 (Table). The opinion of the district court (Pet. App. 13a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1995. A petition for rehearing was denied on August 29, 1995. Pet. App. a23-a24. The petition for a writ of certiorari was filed on November 27, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September, 1992, petitioner Louis J. Posner enrolled his son Daniel in a nursery school operated by respondent Central Synagogue. Pet. App. a15. Respondent had a policy of keeping classroom doors open so that children having difficulty adjusting to school could have access to a parent outside the room. *Id.* at a3, a15. Daniel began leaving the nursery school classroom without permission, and, in accordance with school policy, his mother was asked to accompany him to school and to sit in the hallway outside his classroom. *Id.* at a3. After she did so for one day, petitioner wrote a letter to respondent, stating that his wife was needed in his law practice and asking that respondent deal with the problem in some other way. *Id.* at a3, a15. In the alternative, petitioner asked that respondent expel Daniel and refund his tuition. *Id.* at a3. Respondent chose the latter option. *Id.* at a4. When petitioner asked respondent to refund his synagogue dues as well, respondent refused. *Ibid.*

In November, 1992, petitioner initiated an action in New York Civil Court to recover $1175 in dues he had paid to respondent. Pet. App. a4. Petitioner later amended his complaint to add a claim for $22,500 in consequential damages. *Id.* at a4-a5. In March, 1993, petitioner asserted for the first time that respondent had discriminated against his son on the basis of a disability, and requested that respondent reinstate Daniel in school, without requiring either parent to attend. *Id.* at a5. At that point, respondent agreed to refund petitioner's dues, but refused to readmit

Daniel to its school under the terms proposed by petitioner. *Ibid.*

In April, 1993, petitioner filed an action in federal district court, alleging that his son's inability to remain in the classroom resulted from a language disorder and that respondent's failure to accommodate that disability violated the Education of the Handicapped Act, 20 U.S.C. 1401 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*; and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, *et seq.* Pet. App. a2-a3. Petitioner asserted a cause of action for those alleged violations under 42 U.S.C. 1983. Pet. App. a3. Petitioner also asserted a cause of action under the ADA. Govt C.A. Br. 4. As relief, petitioner sought four million dollars in compensatory damages and eight million dollars in punitive damages. Pet. App. a32.

In the same month, petitioner moved to transfer his state court case to New York State Supreme Court and to amend his complaint to allege that respondent had discriminated against Daniel on the basis of his disability, in violation of a state human rights law. Pet. App. a6. In October, 1993, the New York State Supreme Court denied petitioner's motion, finding his discrimination claim "bereft of current or prospective support, as well as, common sense." *Id.* at a32. The Appellate Division, First Department, affirmed, ruling that petitioner had "failed to establish any factual or legal basis for the proposed amended claim that the defendant had engaged in discriminatory conduct." *Id.* at a27. The New York Court of Appeals denied leave to appeal. *Id.* at a34.

Meanwhile, in the federal action, respondent moved for summary judgment, arguing, *inter alia*, that it fell within the ADA's exemption for religious organizations. Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation, including privately owned nursery schools. 42 U.S.C. 12181(7)(J) (Supp. V 1993). Exempt from that prohibition, however, are "religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. 12187 (Supp. V 1993). Once respondent asserted the religious organization exemption, petitioner challenged the constitutionality of that exemption. In accordance with 28 U.S.C. 2403 and Fed. R. Civ. P. 24(c), the district court then certified to the Attorney General that the constitutionality of a federal statute had been placed in issue, and the United States intervened to defend the constitutionality of the exemption. Gov't C.A. Br. 6.

The district court granted respondent's motion for summary judgment, but without addressing the constitutionality of the religious organization exemption. Pet. App. a11-a20. It held that the state courts had found that respondent had not discriminated on the basis of disability and that the Full Faith and Credit Statute, 28 U.S.C. 1738, precluded relitigation of that issue in federal court. Pet App. a18-a20.

2. In an unpublished opinion, the court of appeals affirmed. Pet. App. a1-a10. The court held that 28 U.S.C. 1738 precludes the relitigation of issues resolved in prior state court proceedings, and it concluded that the prior state court proceedings in this case had "conclusively resolved the discrimination issue." Pet. App. a8.

ARGUMENT

Petitioner contends (Pet. 23-28) that the Court should grant certiorari to decide whether the religious organization exemption to the Americans with Disabilities Act of 1990, 42 U.S.C. 12187 (Supp. V 1993), violates the Establishment Clause of the First Amendment. Review on that issue is not warranted.

Both courts below determined that petitioner's claim of discrimination based on disability had been conclusively resolved against him in state court and that the Full Faith and Credit Statute, 28 U.S.C. 1738, precluded relitigation of that issue in federal court. See generally *Matsushita Electric Co.* v. *Epstein*, No. 94-1809 (Feb. 27, 1996). For that reason, neither court addressed the constitutionality of the religious organization exemption to the ADA. Because the courts below did not address that question, it is not properly presented here. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).[2]

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[2] In *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987), this Court upheld the constitutionality of a provision exempting religious organizations from the prohibition against discrimination on the basis of religion contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1. The Court held that the exemption satisfied the three-part test set out in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), because it was rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. 483 U.S. at 335-339. The Court rejected the contention that the exemption was overbroad because it reached secular as well as religious activities, reasoning that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Id.* at 336. No court of appeals has ad-

CONCLUSION

The petition for a writ of certiorari should be denied as to Question 1.

Respectfully submitted.

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dressed the constitutionality of the religious organization exemption in the ADA.